

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Reserved on: 9th July, 2019
Decided on: 22nd August, 2019

+

CRL.A. 743/2017

DEVKI NANDAN @ DEVI SINGH

..... Appellant

Represented by: Mr. Prashant Mehta, Advocate,
DHCLCS

versus

STATE

..... Respondent

Represented by: Ms. Rajni Gupta, APP for
the State with SI Sandeep
Shrivastawa, PS Bharat Nagar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the present appeal, Devki Nandan @ Devi Singh challenges the impugned judgment dated 20th September 2016 convicting him for the offence punishable under Section 307 IPC in FIR No. 549/2014 registered at PS Bharat Nagar and the order on sentence dated 22nd September 2016 directing him to undergo rigorous imprisonment for a period of six years and to pay a fine of ₹15,000/- in default whereof to undergo simple imprisonment for a period of two months.

2. Learned counsel for the appellant submits that the injured 'S' in her testimony admitted that she was sleeping at the time of incident and she could not tell the colour of the clothes appellant was wearing at the time of the incident. He further contends that the son of the injured deposed that he

did not know anything about the incident as he was sleeping at that time. He contends that the whole case sought to be made against the appellant is based on leading questions put forth to the son of the appellant and injured. He contends that the owner of the jhuggi was not present at the spot and that he had no problem with the appellant. Appellant informed his relative Rajnish about the incident and made a call to PCR from his number which took 'S' to the hospital. Photographs of 'S' in compromising position were never placed on record. Appellant did not know the name of the assailant as he was sleeping at the time of incident and got up only after hearing the cries of 'S'. Relying upon the decision of the Bombay High Court reported as 2011 CRI. L.J. 2713 Anant Nathu Mankar and others. v. State of Maharashtra it is contended that at best an offence punishable under Section 326 IPC is made out and not 307 IPC and hence in the alternative conviction of the appellant be converted to one under Section 326 IPC and he be released on the period undergone.

3. Per contra, Learned APP for the State submits that that the injured in her testimony categorically mentions the name of the appellant as the person who hit *tawa* on her head. She further contended that son of the appellant was a tortured witness as can be seen from his testimony wherein he stated that he came to court to get his father acquitted. Weapon of offence that is *tawa* was recovered at the instance of the appellant and as per the FSL report, the DNA profile from the blood taken from the *tawa* matched with the DNA profile of 'S'. She further states that the nature of injury was grievous and the injury was sufficient to cause death in the ordinary course to nature. Reliance is placed upon the decision of the Bombay High Court reported as (2006) 10 SCC 681 Trimukh Maroti Kirkan v. State of

Maharashtra.

4. Process of law was set into motion on 9th October 2014 at around 1:30 A.M. when information was received by Ct. Aadesh Kumar that one woman was lying in seriously injured condition in front of House No. 13/6 R.P Bagh, Ramdulare Halwai Vali Gali. Aforesaid information was recorded vide DD No.2PP (Ex.PW-5/A) and was assigned to ASI Ram Niwas. He along with HC Rohtash reached the spot where he came to know that the injured had been removed to the hospital and there was blood lying on the floor. No eyewitness was present at the spot and the children of the injured were not in a condition to give the statements. Thereafter, he went to Hindu Rao Hospital and collected the MLC of the injured 'S'. Doctors opined that the injured was not fit for making any statement and she was shifted to Higher Centre for further treatment. He returned to the place of incident and called the crime team, who inspected the spot. They took photographs from different angles. Blood stained pant of blue colour was kept in pulanda and blood was also lifted from the spot with help of a cotton and same was kept in a plastic container. Earth Control, blood-stained floor were also removed and kept in different plastic containers. The samples were sealed with the seal of RD. All four parcels were taken into possession vide seizure memo Ex.PW-5/B.

5. Further investigation was carried out by SI Rakesh Duhan. On the same day at around 4:30 P.M. he reached LNJP Hospital where the injured was admitted. The concerned doctor opined that the injured was fit for statement. He recorded the statement of injured under section 161 Cr.P.C. wherein she stated that on 9th October 2012 at around 01:00 A.M. after having their dinner when she went to sleep, her husband that is Devki

Nandan (Appellant herein) said bad words about her character and further said that his paternal uncle's son showed him pictures of her doing bad things and that she maintained illicit relationship with some other man. Her husband who was in state of intoxication, aggrieved with her because of the said issue, hit her on head with a *tawa*. He tried to kill her. After the said incident she gained her consciousness in JNP Hospital. He further recorded the statement of son of the injured under section 161 Cr.P.C.

6. SI Rakesh Duhan prepared a raiding team comprising of ASI Jai Prakash, HC Rohtash and Ct. Vikram. All of them went to the jhuggi of the accused but he was not found there. Mool Chand, landlord of the said jhuggi informed that the accused went towards the railway line. He along with the raiding team and Mool Chand went to the railway line where the accused was found. At the identification of Mool Chand, accused was arrested vide arrest memo Ex.PW-11/B and his personal search was conducted vide Ex.PW-11/C. His disclosure statement was recorded vide Ex.PW-11/A as per which weapon of offence that is *tawa* was recovered from his jhuggi. There were blood stains and some hair on the *tawa*. *Tawa* was sealed vide seizure memo Ex.PW-11/D. Appellant was lodged in lock up and on next day he was produced before Ld.MM and sent to Judicial Custody. On 23rd October 2014 he collected the blood samples of the injured 'S' vide memo Ex.PW10/A. On 10th November 2014 he prepared site plan at the instance of the injured vide Ex.PW-19/A. He got the Exhibits deposited at FSL Rohini through Ct. Rajesh and recorded the statements of witnesses.

7. On completion of investigation, charge sheet and supplementary charge sheet were filed. Charge was framed vide order dated 16th February 2015 for offence punishable under Sections 307 IPC against the appellant.

8. 'S' (PW-1), deposed that she did not remember the exact date of the incident, however it was October 2014. She along with her children namely Shivam, Shivani, Sumit and Arjun was sleeping in her jhuggi. She went to sleep at around 10:00 P.M. Her husband Devi Nandan hit on her head with a "tawa" and she became unconscious. When she gained consciousness, she found herself to be in LNJP hospital. Her husband hit her under the influence of liquor. She stated her husband never doubted her character. On the day of incident, her husband told her that he had seen some photographs of her in compromising position with some other person which were shown to him by Lal Deen. In her cross examination she stated that at the time when she was hit, she was sleeping. She further stated that lights were switched off at that time and she did not see the face of the assailant.

9. Master Shivam (PW-2), son of the injured, stated that he forgot about the whole incident and her mother received injury on her head. He went to the owner of jhuggi to call him, but he doesn't remember his name. The owner of the came to his jhuggi and made call to the PCR. Her mother was removed to hospital by PCR officials. He along with his father accompanied the injured to the hospital. He deposed that the accused was a habitual drinker, used to quarrel with the injured and also asked the injured about her illicit relationship with any other person. He further stated that on the day of the incident there was a quarrel between the injured and the accused and that he made them understand, thereafter they became normal. In his cross-examination he stated that at the time of incident he along with his mother, brother and sister were sleeping in the jhuggi and lights were switched off at that time. He further stated that he cannot say about the person who hit her mother as he was sleeping at that time.

10. Mool Chand (PW-3) landlord of the injured stated that he was sleeping in his jhuggi when son of the accused came to him and informed him about the incident. He along with the son of the injured went to the First Floor where he noticed that 'S' was lying in injured condition and blood was oozing out from her head. He stated Rajnish made a call at 100 number. 'S' was removed to hospital by PCR official. In his cross-examination he stated that that he was not present at the spot at the time of incident.

11. Rajnish (PW-4), brother in law of the appellant, he stated that he used to live in the same colony as that of the appellant. He stated that the the appellant came to him and informed him that someone hit 'S' with a weapon due to which she received injury on her head. He along with the appellant reached the jhuggi where 'S' was lying in injured condition. He made call to 100 number from his mobile number and she was taken to hospital by PCR officials.

12. Dr. Sumit Dave (PW-20), SR, Department of Neuro Surgery, PGIMER, Chandigarh stated that in month of October 2014 while posted at LNJP Hospital he had given opinion on the injuries sustained by 'S'. Nature of injury was grievous from neurological point of view. In his cross-examination he stated that the injury was such that it could have caused death also. The injury was itself sufficient to cause death if it remained untreated. As per the MLC (Ex.PW-13/A) following injury was noted:

i. Temporal lacerated wound of 7 cm x 1 cm and blood oozing

13. Poonam Sharma (PW-14), Assistant Director, Biology, FSL, Rohini, Delhi, she stated that parcel no. 1 contained one dirty shirt having brown stains marked as Ex.-1a and one dirty pant having brown stains marked as Ex.-1b. Parcel no. 2 contained blood stained cotton in plastic container

marked as Ex. 2. Parcel no. 3 contained blood stained piece of floor kept in plastic container marked as Ex. 3. Parcel no. 4 contained earth control kept in plastic container marked as Ex. 4. Parcel no. 5 contained the metallic tawa with wooden handle having darker stains and was marked as Ex. 5. Parcel no. 6 contained blood samples of injured 'S' kept in tube marked as Ex. 6. On biological examination of above-mentioned exhibits, blood was detected on Ex.-1a, Ex.-1b, Ex. 2, Ex. 3, Ex. 5 and Ex. 6. Blood was not detected on Ex. 4. On DNA examination of Ex. 6 and Ex. 5, DNA profile generated from source of *tawa* was similar to DNA profile of blood sample of injured 'S'. The detailed report qua DNA analysis was exhibited as Ex. PW-14/A. On Serological examination, the human blood of A- Group was found on shirt, pant, cotton wool swab and the *tawa*. She exhibited the serological report as Ex. PW-14/B.

14. Devki Nandan @ Devi Singh in his statement recorded under Section 313 Cr.P.C. stated that he himself called the police and got 'S' admitted in the hospital. He stated that his wife had not seen the person who attacked her and she wrongly gave his name to the police officials under the influence of the Investigating Officer. He further stated that nothing was recovered from his jhuggi at his instance and that the recovery was planted upon him by the police officials. He stated that he made a call to 100 number from the mobile of Rajnish. He further stated that on the day of the incident he was sleeping with his children and woke up after hearing cries of his wife. He saw that blood was oozing out from her head. He asked his son to get help from the relatives, neighbors and his landlord. He went to get some vehicle to shift 'S' to the hospital. One of his relatives Rajnish came to the spot and

thereafter they called the police. He further stated that police officials in order to save the real culprits falsely implicated him in the present matter.

15. Entire case of the appellant is that since the injured and the children were sleeping she could not have seen the appellant and hence the appellant is entitled to the benefit of doubt. The incident occurred at night when in the *jhuggi* appellant, his wife and the minor children were present. It is neither the case of the prosecution nor of the appellant that there was any other person inside the *jhuggi* or anybody entered therein. The injured has supported the entire prosecution case except that she stated that her husband never doubted her character. She however stated that on the day of incident her husband had told her that he had seen some photographs of her in compromising position with another person as shown by one Lal Deen and that he hit her under the influence of liquor. She repeatedly attributed the act of hitting the *tawa* on her head to her husband. Version of injured is also corroborated by the FSL report as well as the report of DNA analysis which finds the blood of the injured on the *tawa*. Even in her cross-examination she denied the fact that the appellant did not hit her on her head with the *tawa*. Moreover, the time of incident being such rules out the possibility of a third person causing the injury and no explanation in this regard has been rendered by the appellant. Even the son of the appellant and the injured though in his cross-examination in chief stated that he forgot the full incident, however stated that his mother received the injury on her head where after he went to the owner of the *jhuggi* to call him. Someone made a call to the PCR and his mother was removed to the hospital by the PCR officials. In his examination in chief the child witness also stated that he had come to the Court to get his father acquitted and in his cross-examination

denied the suggestion that his mother was hit by some other person as a result of which his mother received the injury on her head.

16. Contention of learned counsel for the appellant that the whole case has been made out against the appellant on the basis of leading questions is incorrect as no leading question has been put to the injured. As regards PW-2, the son of appellant and the injured who was aged 12 years at the time of his deposition, three leading questions have been put to this witness, one relating to the habit of his father consuming liquor and that a quarrel had taken place on the date of incident between his parents and that he has gone to the owner of the *jhuggi* to call him which he admitted to be correct.

17. Even in his statement under Section 313 Cr.P.C. the case of the appellant is that on the day of incident he was sleeping with his children and woke up after hearing cries of his wife and found that blood was oozing from her head. He asked his son to ask for help from relatives, neighbor and landlord and he himself went to pick some vehicle so that she could be shifted to the hospital. After some time one of his relatives namely Rajnish came to the spot and thereafter they called the Police. The Police officials in order to save the real culprit falsified implicated him. Admittedly besides the injured and the minor children it was the appellant who was present in the *jhuggi* at the wee hours of the night. Facts which happened were within the special knowledge of the appellant and the injured and without any other plausible explanation the appellant cannot get away by saying that someone hit his wife who got injured.

18. Once the appellant was the only other person besides the injured and the children in the *jhuggi*, onus shifts on him under Section 106 of the Indian Evidence Act to prove how the injury was caused to the victim which onus

he failed to discharge. Supreme Court in the decision reported as (2006) 12 SCC 254 State of Rajasthan Vs. Kashi Ram held:

“23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., Re. [AIR 1960 Mad 218 : 1960 Cri LJ 620]”

19. Relying upon the decision of the Bombay High Court in Anant Nathu Mankar (supra) learned counsel for the appellant in the alternative contends that the offence allegedly committed by the appellant would at best be an offence punishable under Section 326 IPC and not 307 IPC hence the conviction of the appellant be altered to one for offence punishable under Section 326 IPC and he be released on the period already undergone. In the

case of Anant Nathu Mankar (supra) burning lamp was thrown at the victim from the portion of abutting the road which showed that no special preparation was made by the accused to perpetrate the crime and the accused No.2 therein, out of the rage, what was handy then used the same as the weapon of offence. In the present case the appellant was intoxicated and having been shown the photograph of his wife with someone in a compromising position by one Lal Deen, had quarreled with the injured however the hitting on the head by the *tawa* did not take place at the time of the quarrel. Both appellant and the injured along with their children slept and while in sleep the appellant inflicted injury with the *tawa* on the head of the injured thus having sufficient cooling time and to think before hitting. Hence, the appellant cannot avail the benefit of offence punishable under Section 326 IPC.

20. Considering the evidence of the injured and that it is duly corroborated by her MLC and the FSL report, this Court finds no infirmity in the impugned judgment of conviction and order on sentence. Appeal is accordingly dismissed.

21. Copy of this order be sent to Superintendent Central Jail Mandoli for updation of the Jail record and intimation to the appellant.

22. TCR be returned.

(MUKTA GUPTA)
JUDGE

AUGUST 22, 2019
sk/rk